United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2000

ORIGINAL

To be argued by
DUGALD CAMPBELL BROWN

In The

United States Court of Appeals

For The Second Circuit

AUTOMATIC RADIO MFG. CO., INC., and MERIT INTERNATIONAL CORP.,

Plaintiffs-Appellants,

- against -

CROWN RADIO CORPORATION (JAPAN),

Defendant-Appellee,

- and -

CROWN RADIO CORPORATION (NEW YORK),

Defendant.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLEE

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OTHER AUTHORITIES

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BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

This brief is submitted on behalf of Defendant-Appellee Crown Radio Corporation (Japan) (hereinafter "Crown (Japan)"). By order dated July 1, 1974, the United States District Court for the Southern District of New York (per Carter, D.J.) granted Crown (Japan)'s motion to dismiss the above-entitled action upon the ground that a previous decision and judgment of the District Court (per Motley, D.J.) dismissing a prior action for lack of personal jurisdiction over

Crown (Japan) is res judicata. Plaintiffs-Appellants' appeal from Judge Carter's order.

COUNTER-STATEMENT OF THE CASE

Appellants' "Statement of the Case" and "Statement of Facts" are erroneous in several important respects. Accordingly, we are constrained to include herein a "Counter-Statement of the Case."

Appellants, Automatic Radio Manufacturing Co., Inc. (hereinafter "Automatic") and Merit International Corp. (hereinafter "Merit") are corporations duly organized and existing under the laws of the State of Massachusetts (88a)*. Merit, a wholly-owned subsidiary of Automatic, maintains two principal places of business, viz., Massachusetts and Japan (88a).

Crown (Japan) is a corporation duly organized and existing under the laws of Japan (45a).

Crown Radio Corporation (New York) hereinafter "Crown (New York)" was incorporated in New York State in 1961. Since vacating its New York office in August 1968, Crown (New York) has maintained its principal place of business in San Francisco, California (9a).

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* The numbers in parenthesis refer to pages in the Appendix unless otherwise indicated.

In a prior action instituted in the District Court by Appellants against Crown (Japan) entitled "Automatic Radio Mfg. Co. and Merit International Corp., Plaintiffs, against Crown Radio Corporation, Defendant, 71 Civ. 267," Appellants sought to recover damages for an alleged breach of an agreement entered into in Japan between Merit, as agent for Automatic, and Crown (Japan). Plaintiffs' complaint in that action alleged in substance that Crown (Japan) agreed to manufacture certain cassette recorder players and accessories for Plaintiffs and that Crown (Japan) violated a provision of the agreement which prohibited Crown (Japan) from offering for sale a model similar to the one manufactured for Plaintiffs to other companies or persons without the written consent of Plaintiffs.

By decision dated April 28, 1972, the District Court (per Motley, D. J.) granted Crown (Japan)'s motion to dismiss the action under Rule 12(b)(2) of the Federal Rules of Civil Procedure upon the ground that it lacked personal jurisdiction over Crown (Japan) (71a-83a).

On page 7 of that decision Judge Motley stated as follows:

"Our decision to grant defendant's motion, then, is based entirely on plaintiff's failure to make a prima facie showing of grounds for in personam jurisdiction here." (77a.)

In particular, Judge Motley determined that Appellants had made an insufficient showing that Crown (Japan) was "doing business" in New York State (77a - 79a).

In accordance with the decision of April 28, 1972, an Order and Judgment was entered on June 7, 1972 dismissing the complaint pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure upon the ground that the Court lacked personal jurisdiction over Crown (Japan) (84a - 86a).

On December 11, 1972, Appellants commenced the present action against Crown (Japan) and Crown (New York). Despite the addition of Crown (New York) as a defendant, Appellants asserted essentially the same facts and demanded the same relief as they did in their prior action against Crown (Japan).

Crown (Japan) moved below to dismiss this action upon the ground that the Court's prior determination on the question of personal jurisdiction over Crown (Japan) is res judicata. Crown

(Japan) also moved to dismiss, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Practice, upon the ground that Crown (Japan) is not "doing business" in New York State, and, further, that it is not subject to jurisdiction by reason of Section 302 of the New York Civil Practice Law and Rules.

By order dated July 1, 1974, the District Court (per Carter, D. J.) held that the question of in personam jurisdiction was res judicata, and granted Crown (Japan)'s motion for dismissal.(135a.) It is from the July 1, 1974 order that Appellants appeal.

COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the issue of personal jurisdiction over Crown (Japan) is res judicata.

II. If the issue of personal jurisdiction over Crown (Japan) is not res judicata, whether Crown (Japan) is "doing business" in New York or is otherwise subject to jurisdiction pursuant to Section 302 of the New York Civil Practice Law and Rules.

ARGUMENT

POINT I

THE ISSUE OF JURISDICTION OVER CROWN (JAPAN) IS RES JUDICATA

The decision of Judge Motley (71a-83a) in the previous action determined that Appellants had failed to prove that Crown (Japan) was "doing business" in New York, and granted Crown (Japan)'s motion to dismiss for lack of personal jurisdiction. Thereafter, on June 7, 1972, pursuant to that decision, a combined Order and Judgment was entered dismissing the action pursuant to Rule 12 (b)(2) of the Federal Rules of Civil Procedure (84a-86a). That judgment should now preclude Appellants from again litigating the question of personal jurisdiction over Crown (Japan).

In American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932), the Supreme Court of the United States declared that:

> " . . . the principles of res judicata apply to questions of jurisdiction as well as to other issues."

Accord: Treines v. Sunshine Mining Co., 308 U.S. 66, 78 (1939); City of Buffalo v. Plainfield Hotel Corp., 177 F. 2d 425 (2d Cir. 1949); Hadge v. Second Federal Savings and Loan Ass'n of Boston, 409 F. 2d 1254, 1259 (1st Cir. 1969); Ripperger v. A. C. Allyn & Co., Inc., 37 F. Supp. 373 (S. D. N. Y. 1940), aff'd 113 F. 2d 332 (2d Cir. 1940), cert. denied 311 U.S. 695 (1940). *

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* Appellee also respectfully refers the Court to two New York cases which have determined that the principle of res judicata precludes a party from relitigating the issue of jurisdiction. See Singer v. Walker, 21 App. Div. 2d 285 (1st Dep't 1964), aff'd 15 N. Y. 2d 443 (1965); Millner v. Noudar, L. D. A., 24 App. Div. 2d 326 (1st Dep't 1966.).

In Ripperger v. A. C. Allyn & Co., supra, defendants successfully moved to dismiss a prior action upon the ground that venue was improper as to them. An order to that effect was entered but plaintiff took no appeal therefrom. Instead, plaintiff chose to bring a new action alleging the same jurisdictional facts. The District Court, following the Baldwin principle, stated:

> "The plaintiff has no right to litigate the same question twice. ***'The principles of res judicata apply to questions of jurisdiction as well as to other issues.'"
>
> * * * *
>
> "A dismissal of an action on the sole ground that the Court has no jurisdiction of the subject matter or of the parties is a conclusive determination of the fact that the Court lacks jurisdiction. . . ." (37 F. Supp at 374.)

In this action, as Judge Carter noted below, Appellants' complaint and affidavits in opposition to the motion to dismiss are "merely a rehash of what was brought before and considered by Judge Motley in the prior proceeding." (135a.) While Appellants' complaint in this action makes some additional allegations which were not stated in the complaint in their previous suit, no new "jurisdictional facts" have been alleged.

In paragraphs "5", "12", "19", "25" and "30" of their complaint in this action, Appellants allege that Crown (New York) is the "agent" of Crown (Japan) (89a - 94a). This point was clearly an issue in the first action. The affidavit by Mr. Kazunaka Uesugi, Vice President and Treasurer of Crown (New York) submitted in the first action, contained the statement, at page 3 thereof, that Crown (New York) is a corporation independent of Crown (Japan), which operates under the "supervision and control of its own officers and directors" (10a). In addition, a reading of Judge Motley's decision (71a - 83a) clearly shows that the Court considered the question of whether Crown (New York) was the agent of Crown (Japan). At page 7 of that decision, the Court stated:

> ". . . thus defendant asserts that Rosen does no business with Crown, that Rosen acts as an independent contractor for Crown San Francisco [Crown (New York)], and that Crown San Francisco [Crown (New York)] is not an agent for Crown." (77a.)

Appellants next assert, in paragraphs "5", "19", "21" and "37" of their complaint in this action, that sales of Crown (Japan)'s products occurred in New York in violation of Crown (Japan)'s agreement with Appellants (89a - 92a, 96a). This same allegation, however, was raised in the first action at paragraph sixteen of Appellants' complaint

(59a) and at paragraph nine of the affidavit submitted by Daniel Rosen, Esq., in opposition to Defendant's motions to dismiss (26a). Moreover, Judge Motley found, at page nine of her opinion, that Appellants had failed to prove this allegation (79a).

Appellants further allege that some of the negotiations involving the "contract" with Crown (Japan) took place in New York (89a). This allegation is patently false for, as Judge Motley found, the contract was negotiated entirely in Japan (78a).

Therefore, it is respectfully submitted that Appellants have not alleged any new "jurisdictional facts" in this action which were not put in issue in their first action against Crown (Japan). For this reason, the principle enunciated in Ripperger should be applied in this action, with the result that the prior adjudication that the Court lacks jurisdiction over Crown (Japan) should preclude Appellants from relitigating the question of jurisdiction over Crown (Japan) in this action.

Appellants also contend that the Order and Judgment dismissing the prior action is not res judicata, because it is not

a final order and not appealable.* Appellants would be correct if Crown (Japan)'s motion in the prior action had been denied. An order or judgment granting Defendant's motion to dismiss, however, is final and appealable as of right. See, e.g., United States v. Montreal Trust Co., 358 F. 2d 239 (2d Cir. 1966); Owen of Georgia, Inc. v. Blitman, 462 F. 2d 603 (5th Cir. 1972).

The cases relied upon by Appellants to establish that the prior order and judgment is not res judicata are inapposite. Columbia Boiler Co. v. Hutcheson, 222 F. 2d 718 (4th Cir. 1955), cited at p. 12 of Appellants' Brief, involved an order denying a motion to dismiss pursuant to Rule 12(b)(2). The cases of Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F. 2d 871 (3d Cir. 1944); and Bucholz v. Hutton, 153 F. Supp. 62 (D. C. Mont. 1957) involved dismissals for improper service of process (Rule 12(b)(5) F. R. C. P.)

In the instant case, Crown (Japan) does not maintain that there has been an adjudication on the merits of Appellants' complaint. Rather, Appellee maintains that the District Court's previous determination that Crown (Japan) is not subject to personal jurisdiction in the State of New York is res judicata on that issue. Conceivably,

*If this contention were correct it would raise an interesting question as to the basis upon which this appeal is before this Court.

another court, notably a court in Japan, might possess jurisdiction over Appellee and thereby adjudicate the merits or lack thereof of Appellants' causes of action.

Therefore, Appellee respectfully submits that the District Court properly held that the issue of personal jurisdiction over Crown (Japan) is res judicata.

Appellants devote a considerable amount of discussion to the benefits of conducting discovery in connection with a Rule 12(b)(2) motion. This is precisely what Judge Motley suggested that Plaintiffs do at page 9 of her decision when she stated (79a):

> "The complaint is therefore dismissed unless, within 20 days from the date of this order, plaintiffs have filed and served sufficient supplemental affidavits."

Appellants chose to ignore that suggestion and failed to file supplemental affidavits or request a hearing on the issue of jurisdiction.

Appellants unquestionably had the burden of proof on the issue of jurisdiction. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Thorington v. Cash, 494 F. 2d 582, 585 (5th Cir. 1974); Baldridge v. McPike, Inc., 466 F. 2d, 65, 68 (10th Cir. 1972); Evans v. Eric, 370 F. Supp. 1123 (S.D.N.Y. 1974). Significantly, both Judge Motley (77a) and Judge Carter (136a) found that Appellants failed to meet that burden.

POINT II

CROWN (JAPAN) IS NOT "DOING BUSINESS" IN NEW YORK STATE OR SUBJECT TO PERSONAL JURISDICTION UNDER SECTION 302 OF THE CIVIL PRACTICE LAW AND RULES

The "Doing Business" Test

The amenability of a foreign corporation to suit in an action based upon diversity of citizenship is governed by the law of the state in which the federal court sits. Arrowsmith v. United Press International, 320 F. 2d 219 (2d Cir. 1963). In New York, in the absence of "long-arm" jurisdiction, a corporation must be "doing business" in this State in the traditional sense in order to be subject to in personam jurisdiction. Gelfand v. Tanner Motor Tours, Ltd., 385 F. 2d 116 (2d Cir. 1967); Frummer v. Hilton Hotels, Int'l, 19 N. Y. 2d 533 (1967).

The test as to what constitutes doing business in New York is the classic "presence" test, promulgated by the Court of Appeals in Tauza v. Susquehanna Coal Co., 220 N. Y. 259 (1917). In order to be subject to personal jurisdiction, a corporation must be here " . . . not occasionally or casually, but with a fair measure of permanence and continuity. . . ." 220 N. Y. at 267.

As a gauge of whether a foreign corporation has conducted enough activity in New York State to satisfy the Tauza test, the courts of New York will look to the cumulative significance of all

activities conducted in the State by the Corporation. Hastings v. Piper Aircraft Corp., 274 App. Div. 435 (1st Dep't 1948).

We respectfully submit that under the facts presented here, the "doing business" test has not been satisfied. The affidavit of Mr. T. Uchiyama of Crown (Japan), submitted in support of Appellee's motion below, shows that Crown (Japan) does not maintain and never has maintained any office, place of business, telephone listing, mailing address, bank account, warehouse or inventory in the State of New York, that no officers, directors or employees of Crown (Japan) are domiciled or residing in New York, and that Crown (Japan) neither owns nor leases any real property in New York (46a-47a).

In addition, the fact that Crown (New York) is incorporated in New York State is insufficient to confer jurisdiction upon Crown (Japan) in the absence of any evidence that Crown (New York) is the alter-ego or agent of Crown (Japan). See Frummer v. Hilton Hotels, Int'l, 19 N. Y. 2d 533 (1967); Taca International Airlines, S.A. v. Rolls-Royce of England, Ltd., 15 N. Y. 2d 97 (1965). The record is devoid of any such evidence.

Appellants submitted two affidavits below in opposition to Crown (Japan)'s motion to dismiss: an affidavit of David Housman, Chairman of the Board of Directors of Automatic (100a-109a), and

an affidavit of Daniel Rosen, attorney for Appellants (112a-119a). Only Mr. Housman's affidavit purports to be based on personal knowledge. *

At paragraph 10 of his affidavit, Mr. Housman asserts that certain "representatives" of Crown (Japan) informed him that Crown (Japan) had "absolute" control of Crown (New York), and, further, that Crown (New York) was the "agent" of Crown (Japan) (103a). At paragraphs 15 and 16 of his affidavit, Mr. Housman asserts that officers of Crown (Japan) told him that Crown (Japan) maintained a New York office (104a-105a).

Thus, Appellants' allegation that Crown (New York) is the "agent" of Crown (Japan) is based essentially on various "representations" allegedly made to Mr. Housman by certain individuals. These alleged representations, however, are of no significance because New York courts have rejected the doctrine of "jurisdiction by estoppel." Miller v. Surf Properties, Inc., 4 N. Y. 2d 475 (1958);

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*Appellants, in addition, submitted two additional affidavits of officers of Automatic and Merit (110a, 111a). These affidavits merely purported to "corroborate" the information contained in Mr. Housman's affidavit, and did not contain any new allegations.

Gelfand v. Tanner Motor Tours, Ltd., 339 F. 2d 317 (2d Cir. 1964). The issue is not whether statements were made to Appellants, but rather whether the undisputed facts are sufficient to establish jurisdiction. Appellants have set forth no facts which in any way demonstrate the existence of an agency relationship between Crown (New York) and Crown (Japan).

In contrast, the facts set forth in the affidavits submitted by Kazunaka Uesugi in support of Appellee's motion in the first action, (8a - 11a), and T. Uchiyama (45a - 48a), officers of Crown (New York) and Crown (Japan) respectively, strongly weigh against any finding of agency. Both Mr. Uesugi and Mr. Uchiyama state that while Crown (Japan) owns most of the stock of Crown (New York), Crown (New York) operates as an independent corporation under the supervision and control of its own officers and directors. In addition, the books and records of Crown (New York) are not maintained by Crown (Japan)'s accountants, and the financial records of Crown (New York) are not reported on a consolidated basis with those of Crown (Japan). Furthermore, Crown (Japan) does not pay for or prepare promotional and advertising materials used by Crown (New York) in the United States (10a - 11a, 47a).

Those affidavits also show that Crown (Japan) markets its products in the United States independently of Crown (New York). Mr.

Uchiyama states, at paragraph 7 of his affidavit, that:

> "Crown (Japan)'s method of marketing its products for eventual use in the United States is to sell its products in Japan to other Japanese or American corporations which make their own arrangements for the importation of these products into the United States. Once Crown (Japan) has sold its products in Japan, it plays no further role in the distribution process and does not warrant or guarantee products purchased in Japan destined for resale in the United States." (47a - 48a.)

Finally, it should be noted that Crown (New York) performs no activities in New York for Crown (Japan). Crown (New York)'s only connection with this State is the solicitation of sales here by two independent sales representatives, who are compensated on a commission basis only, and who are not exclusively representatives of Crown (New York). No control is exercised over these representatives by Crown (New York). All orders solicited by these representatives are subject to acceptance by Crown (New York) in San Francisco (9a).

The facts set forth in the affidavits of Mr. Uesugi and Mr. Uchiyama remain uncontradicted in the record before this Court. On the basis of these affidavits, Appellee respectfully submits that Crown (New York) is not the "agent" or "alter-ego" of Crown (Japan), and, further, that Crown (Japan) is not "doing business" in New York.

The Long-arm Statute:
Section 302 of the Civil
Practice Law and Rules

Appellants contend, at pages 27-28 of their Brief, that the District Court "has jurisdiction over the person of Crown Radio Corporation (Japan) under almost every subdivision of § 302 of the CPLR." This assertion is wholly without merit.

Appellants maintain that Subdivision 1 of CPLR 302(a) (the "transaction of business" provision) is applicable because Crown (New York) "transacts business" in New York (Appellants' Brief, p. 22). The affidavit of Kazunaka Uesugi, however, clearly states that Crown (New York) has not conducted business activities in New York since August 1968 (9a), long before the accrual of the causes of action alleged in the complaint. Nevertheless, even if Crown (New York) did transact business in New York, which it does not, and even if Crown (New York) were the agent of Crown (Japan) which it is not, Appellants' alleged causes of action did not arise out of any of the activities of Crown (New York). All of the acts complained of were acts of Crown (Japan) which occurred in Japan: the alleged "agreement" was negotiated entirely in Japan (46a, 78a); all merchandise covered by Appellants' purchase orders was delivered to Appellant Merit in Japan, and no activities connected with the making and performance of this agreement occurred in New York (46a).

In addition, Appellants may not rely upon subdivision 3, of CPLR 302(a) (commission of a tortious act outside of New York which causes injury to person or property within New York) as a basis for jurisdiction.

Appellants allege, in paragraphs "1" and "2" of the complaint, that they are Massachusetts corporations, that Automatic has its principal place of business in Massachusetts, and that Merit has two principal places of business, viz., Massachusetts and Japan. They have not made, nor could they make any allegations that they sustained damage in New York. If indeed Appellants have sustained any damage, that damage was sustained in Massachusetts and Japan.

In Gildenhorn v. Lum's Inc., 335 F. Supp. 329, 335 (S. D. N. Y. 1971), rev'd on other grounds. 478 F. 2d 817 (2d Cir. 1973), the Court stated:

> "Finally, there can be no jurisdiction under CPLR § 302(a)(3). As the statute clearly states, the tortious acts must cause injury to persons or property in New York. Insofar as none of the non-resident plaintiffs in these cases have alleged that any injury occurred in New York, their invocation of this provision is futile."

CONCLUSION

Appellants have set forth no jurisdictional facts which were not before the District Court on the prior motion. Therefore, the order and judgment entered on June 7, 1972 is res judicata on the issue of jurisdiction over the person of Crown (Japan). Even if it were not, Appellants have failed to sustain their burden of showing that Crown (Japan) is subject to the jurisdiction of the District Court. Accordingly, the order appealed from, entered on July 1, 1974, should be affirmed in all respects.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

UNITED STATES COURT OF APPEALS:2nd CIRCUIT

Index No.

AUTOMATIC RADIO & MERIT INTERNATIONAL CORP.,

Plaintiffs-Appellants,

against

CROWN RADIO CORP. (JAPAN),

Defendant-Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 13th day of January 1975 at 30 Broad Street

deponent served the annexed Brief for Defendant-Appellee upon

Daniel Rosen attorney for

the Pl.-Applt. in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 13th day of January, 1975 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975